



**Hi-Tech Training School**  
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**Fax Cover Sheet**

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# of pages including this one 13

Comments:



**STATEWIDE HISPANIC CHAMBER  
OF COMMERCE OF NEW JERSEY**

July 2, 2001

Debbie Myers  
T.M. Consultants, Inc.  
P.O. Box 3016  
Plainfield, NJ 07060

**RE: (1) \$8.6 Billion of New Spending for Abbott District Schools in New Jersey  
(2) NJ Economic Development Authority's (NJEDA) Emerging  
Affirmative Action/MBE/WBE/SBE Participation Guidelines**

Dear MBE/WBE/SBE Business Owner:

We are writing you out of deep concern for the future economic well being of your business. The Statewide Hispanic Chamber of Commerce of New Jersey (SHCC) has established an *Ad Hoc Task Force on MBE/WBE/SBE Survival* to address the emerging issues in the New Jersey EDA's Financing Program for School Construction that concern all Minority/ Women and Small business owners.

The SHCC's Ad Hoc Task Force is particularly mindful of the very small number of MBE/WBE/SBE's that have been pre-qualified by the NJEDA to perform work under the State's \$8.6 Billion School Spending program. At this point that number stands at approximately 170 businesses for all professional services, contractors and related products.

A second troubling concern is that the NJEDA, which for a year has publicly committed itself to strong MBE/WBE/SBE participation in the school-financing program, is about to publish preliminary guidelines for MBE/WBE/SBE participation in the School Financing Construction Program. The Task Force is very concerned that some of the language in the guidelines and potentially how that language might be implemented may be to our financial detriment.

We have attached a draft copy of the NJEDA's Affirmative Action and Set Aside Regulations. We respectfully suggest that you read these interim regulations. While they have not been formally adopted at this point, we believe that the pending publication and adoption of the guidelines may vary little from the enclosed language.

For your information, we suggest that you may want to also review an analysis of the NJEDA's Affirmative Action Regulations that was prepared by the NJ Institute for Social Justice's (NJSJ). A copy of NJSJ's analysis is also attached for your information. **Please note:** that while the Task Force does not necessarily endorse all of the comments raised by the NJSJ in its review, we are providing that review for the sake of quickly sending out to you a comprehensive analysis of NJEDA's MBE/WBE/SBE guidelines.

As you know, NJEDA's School Financing Program will be carried out over an 8-10 year period. The commitment by the State of New Jersey to embark on this comprehensive \$8.6 Billion school financing building program was, in part, the result of an 18 year court battle to bring the New Jersey State Constitution's promise to provide *all* New Jersey public school children with a '*thorough and efficient education*' to all the children of New Jersey's public schools.

Whatever final MBE/WBE/SBE Participation Guidelines are adopted by NJEDA, the MBE/WBE/SBE community may very well have to live with those guidelines for the next decade. The NJEDA's School Financing Program has taken almost 20 years to implement. Before the NJEDA's Affirmative Action Guidelines are implemented the **SHCC Ad Hoc Task Force on MBE/WBE/SBE Survival** believes that more work must first be done to further enroll larger numbers of bona fide Minority, Women, and Small businesses in the MBE/WBE/SBE Program.

The Task Force also believes that the Guidelines, as they stand, should not be adopted until more input from the impacted MBE/WBE/SBE Community is solicited for the development of these Regulations.

The ability of the MBE/WBE/SBE Business community to survive and thrive in the next decade may very well be at stake in these Guidelines and how they are written and enforced. The Task Force believes that the MBE/WBE/SBE Business Community must have a fuller say in the development of these Guidelines before they are finalized. The Task Force welcomes broader participation and comment. We invite you to join our efforts.

Sincerely

**Daniel H. Jara**

Daniel H. Jara  
President and Chief Executive Officer

**Attachments:** (1) EDA Regulations on Affirmative Action and Set Asides,  
Dated: 06/12/01  
(2) NJ Institute for Social Justice, Memo to Coalition for Our  
Children/EDA Affirmative Action and Set Aside Regulations  
Dated: 6/19/01

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## Memo

To: Coalition for Our Children's Schools Members/Other Interested Parties  
From: Ken Zimmerman and Nancy Fishman  
RE: EDA Affirmative Action and Set Aside Regulations: Description of Changes  
Date: June 19, 2001

On Tuesday, June 12<sup>th</sup>, the Board of the Economic Development Authority (EDA) adopted a revised version of its proposed rules on "Affirmative Action and Set Asides in Authority-Financed School Facilities Construction Projects Financed and Contracted for by the Authority." We are circulating this summary and the attached analysis in light of the significant and, in some cases, unexpected changes made by the EDA.

Procedurally, these proposed rules have been changed in form to "proposed regulations." As such, interested parties may comment on them during a thirty day period that follows publication by the Office of Administrative Law. We intend to draft comments that the Coalition for Our Children's Schools may use. To that end, we would welcome any comment or questions about the proposed regulations and this analysis.

The following is a brief summary of the most significant changes:

### The Good News:

- The Authority has deleted reference to the "Emerging Small Business" classification, its attempt to create a race and gender neutral designation for use in the affirmative action context. Although EDA continues to anticipate that the New Jersey Commerce and Economic Growth Commission may develop a race and gender neutral designation, the currently proposed regulations now adopt existing state law standards. These standards are, however, currently the subject of a court challenge.
- The Authority has added provisions limiting the ability of contractors to subcontractors, requiring them to submit a replacement request in writing and to try to replace them with another MBE, WBE or SBE subcontractor.

### Description and Analysis of the Proposed Changes

What follows is a detailed analysis of the new proposed rules on "Affirmative Action and Set Asides in Authority-Financed School Facilities Construction Projects Financed and Contracted for by the Authority," particularly in relation to the earlier document drafted by EDA, the "Procedures for Equitable Employment and Business Opportunity in New Jersey Economic Development Authority School Facilities Projects." The memo is organized by topic area. The first six sections - Definitions, Hiring Goals, Workforce Training, Set Asides, Consultant and Contractor Training, and Sanctions - cover subjects addressed by the new regulations and the prior procedures. The last two sections address new provisions included in the regulations which weren't in the earlier document and changes that had been requested by advocates which still haven't been included in EDA's rules.

#### 1. Definitions

The new proposed regulations have deleted reference to "emerging small business or ESB," the race and gender neutral category included in the earlier proposed procedures.

Instead, the new regulations have altered the definition of "small business enterprise" or SBE to include not only "a business that is registered with the New Jersey Commerce and Economic Growth Commission as a small business" but also "any other race and gender neutral business enterprise to be registered" with the Commission. This language is actually similar to language used to define "socially and economically disadvantaged contractors or vendors" in earlier regulations drafted by the Authority, which included Minority Business Enterprises, MBEs, Women-owned Business Enterprises, WBEs, or "any firm that meets small business, net worth and other race and gender neutral standard" established by the Commission. The new regulations also include "socially and economically disadvantaged" but the definition includes solely any registered MBEs, WBEs or SBEs. It is basically a catch-all category.

By way of background, the Commerce and Economic Growth Commission, which inherited the powers and responsibilities of the Department of Commerce and Economic Development in 1998, has exclusive authority to establish a uniform certification procedure for MBEs and WBEs, N.J.S.A. § 52: 27H-21.11, and has promulgated regulations to do so. N.J.A.C. § 12A:11 et seq. Neither the enabling statute nor the regulations include mention of "small business enterprise," "socially and economically disadvantaged" or any other race and gender neutral category. Socially and economically disadvantaged is the term used in the U.S. Department of Justice's 8(a) program, see 15 U.S.C. § 637 (providing for affirmative action in federal government procurement contracts), and to the extent that it or "small business enterprise" appears elsewhere in New Jersey law it is defined with reference to the federal law, or defined within the particular statute involved. See, e.g. N.J.A.C. § 7:22-9.2, the regulations of the Department of Environmental Protection. There doesn't seem to be, in other words, any existing certification procedure for any "race and gender neutral business enterprise." I haven't located any description of a certification procedure for "small business

enterprise" though this is usually accomplished through the state offices of the Small Business Association.

Because no content had yet been given to the "emerging small business" term, it's not clear what has exactly been lost in the translation from the new to the old, but it is a positive development that the EDA eliminated the vague, "neutral" term. Because the ESB category was used throughout the old procedures, and has now been replaced with MBE, WBE and SBE, it suggests that the EDA has largely given up the idea of shifting to a race and gender neutral affirmative action standard. It basically leaves the door open to include a new category if one should be devised by the Commission. From a legal standpoint, the regulations will stand or fall on the structure of the MBE/WBE program.

Other definitions included in this section are roughly the same as those in the prior documents.

## 2. Hiring Goals

**The new regulations still do not include any requirement that contract bidders submit a local hiring and training plan and no longer include explicit preferences or incentives for hiring workers from Abbott districts. There are also no incentives for contractors to use apprentices.**

The hiring goals are addressed in the "Compliance" section, which specifies that a contractor will be in compliance "only if the contractor has made *every effort* to meet the minority hiring goals and female hiring goals for each trade or craft." Contractors, in other words, have to make an effort but they don't have to succeed, and nothing in the regulations requires them to explain why they might not have succeeded. They are to be penalized for failure to comply, but the regulations don't specify what would constitute failure. What seems clear is that not reaching the goals by itself isn't failure. While the prior procedures were also somewhat vague about compliance measures, the language on hiring goals for minorities and women was more definite; each contractor had to "insure" that it met the goals set forth in the contract for each trade or craft and that each subcontractor met those goals. The EDA may have included the new language to increase the rule's defensibility from a legal standpoint, given the current legal trend disfavoring any approach that appears to be a quota as opposed to a goal.

In addition, advocates had suggested the inclusion of a provision requiring bidders, as part of the selection process, to describe the means by which they would meet their hiring goals, via a local hiring and contracting plan. The plan would allow reviewers to assess the reliability of the bidder's plan prior to its implementation and also would provide a measure for performance evaluation throughout the life of the contract. No such requirement has been included.

**Most importantly, the regulations have eliminated explicit incentives for contractors to hire workers from Abbott districts, shifting an explicit hiring preference for Abbott district residents to a more vaguely worded statement of intent. The prior procedures provided that contractors would be rewarded in their performance evaluation if they met their hiring goals with Abbott district workers. This provision is absent from the new regulations. In its place, though, the regulations provide that the minimum effort that must be exercised to be in compliance with minority and female hiring goals include notifying at least two minority referral organizations, giving**

notice to the Superintendent of Schools of the district in which the project is located, and leaving notice with local unions and the local One-Stop Career Center. These are, effectively, "Abbott neutral" measures, which may serve to direct contractors to Abbott districts, but not explicitly so. It's not clear how EDA will reconcile these notice opportunity provisions with the requirements of any operative collective bargaining agreements. The focus of this section, and the section on Monitoring, is on meeting minority and female hiring goals, in accordance with the State's affirmative action law.

The only place in Abbott district preference appears in the new regulations (not including the workforce training sections, discussed below) is in the list of required construction contract provisions. The third provision listed would require contracts to specify that the contractor "must make every effort to employ minority workers and female workers at a level consistent with the applicable hiring goals." It further provides, in contrasting language, that the contractor "should endeavor to support the intent of the Authority to hire socially and economically disadvantaged workers living in Abbott districts." The provision is vague and indirect. It also fails to address how, if at all, these provisions relate to collective bargaining agreements.

We have been told by EDA that the Authority plans to include an Abbott district scoring preference in its "Price and Other Factors" standard for evaluating bids, but it is unclear whether that scoring advantage will accrue based on intention to hire from the districts, the business location of the contractor, and/or the business location of any subcontractors. Moreover, the "interim" procedures adopted at EDA's May Board meeting did not include a geographic preference at all. Final procedures are supposed to be drafted in July.

Adding to the weakness of the existing Abbott preference language is the fact that there is still no provision requiring the Authority to create a reporting and data collection system that specifically tracks recruitment and training of local residents. Contractors and consultants must report race, gender and hours of their tradespeople, and submit an "MBE/WBE/SBE Participation Report" but none of these required reports must include data tracking where employees and subcontractors reside or primarily conduct business. Compliance measures for Abbott district preferences thus appear to be nonexistent.

Finally, advocates had requested that the Authority promote the use of registered apprentices on school construction sites and provide supplemental payments for costs to contractors who did so. It does not appear that the EDA has included any provision to promote the use of apprentices, requiring solely that contractors comply with Prevailing Wage Act regulations, and has not provided any financial support for contractors who use apprentices.

### 3. Workforce Training

While the new regulations have dropped the mandatory language of the procedures regarding the establishment of a training fund, and don't make explicit any connection to school-based construction careers programs, the regulations include a broader definition of kinds of programs that will be funded.

The new regulations provide that the Authority "may apply" up to one half of one percent of expended capital funds for training for women and minority workers. The prior procedures required the Authority to set up a fund for this purpose, in which each

year it would place up to one half of one percent of the estimated amount of construction funds. The regulations, however, include a broad definition of "pre-apprenticeship training," which encompasses areas such as basic skills and literacy, ESL, as well as "other types training" to prepare individuals for apprenticeships and "occupations pertinent to school facilities project construction." While advocates had requested specific language providing for training for construction-related professions, in addition to the trades, this section, though not specific, can potentially reach that far. In addition, the regulations expand the auxiliary uses of training funds to include retention support services, as requested by advocates.

The regulations still do not make explicit the connection between school construction and school-to-construction careers programs in Abbott school districts, or provide that contractors who participate in such programs be compensated for extra costs. The new regulations do provide that the Authority and its State partners shall "exercise a preference for location within Abbott school districts" in establishing training sites, and that they shall undertake outreach efforts to recruit from the Abbott districts. **The EDA has eliminated, however, a provision in the earlier document which would have rewarded contractors who met hiring goals with pre-apprentices and apprentices trained in these programs.**

The new regulations indicate that the Authority may designate the Department of Labor to administer the program, whereas the prior procedures indicated Labor or Treasury could be utilized. On Tuesday, June 12<sup>th</sup>, the Board entered into a Memorandum of Understanding authorizing payment to DOL of the training funds, as well as an administrative budget for their services, to be paid from EDA's administrative budget.

#### 4. Set Asides

**This provision remains structurally similar, except that wherever the procedures used "ESB" the new regulations use "MBE, WBE and SBE." There is no longer any mention of the Abbott district preference.**

The procedures provided that the Authority could require a contractor to make a good faith effort to subcontract up to 15% of its contract value to ESBs. The new regulations put the numbers at 7% for MBEs, 3% for WBEs and up to 15% to SBEs, which is apparently state law at the moment (the old procedures provide that if no ESB classification is developed, MBE, WBE and SBE should be substituted, and that even if ESB certification begins, those goals would still have to be reached, possibly by reinstituting race and gender based programs if the neutral programs didn't accomplish the same goals).

The other major difference here, again, involves the apparent elimination of the Abbott district preference. The procedures provided that contractors who could demonstrate that they would meet or exceed ESB requirements with Abbott district firms would receive additional points during the bid or proposal evaluation process. This provision is absent from the new regulations. As mentioned above, we have been told that there will be an Abbott scoring preference included in EDA's "Price and Other Factors" standards, but the final document including the preference has yet to be drafted and approved. The interim procedures don't include a geographic preference.

### 5. Consultant and Contractor Training

This section of the new regulations includes the programs and services formerly directed at helping ESBs, but directs them instead at "socially and economically disadvantaged businesses." While there are changes in the description of the School Capital Access Program, it's not clear how significant they are, especially given the fact that the specifics of any such Program will be outlined elsewhere.

Services to socially and economically disadvantaged businesses, once they have undergone a training program which "may" be funded and provided by EDA, may include mentoring assistance, a performance bond and financial guarantee program; and a School Capital Access Program, all of which were included in the prior document. The procedures had specified that contractors who served as mentors could receive additional bidding points or performance evaluation points, but this provision is absent from the new regulations. They also don't include a mention of a "wrap-up insurance" plan as a potential service for disadvantaged contractors and consultants.

There is a change in the description of the School Capital Access Program (aside from the name change - the procedures called it the "School Contractors Capital Access Program"). The prior procedures listed three requirements for pre-qualified ESBs seeking access to the program: that they sought facilities project contracts, that they'd been denied credit for these contracts by at least two banks, and that they'd successfully completed the Authority's training program. The new regulations describe the program as being for the benefit of the "classified" companies that seek school facilities project contracts and meet the "financial evaluation criteria of the Authority's financing programs." "Classified" and "pre-qualified" are virtually the same thing: the Educational Facilities Construction and Financing Act authorizes the EDA to establish a classification procedure to pre-qualify firms to bid on facilities projects. Contractors with valid classification from the Division of Property Management and Construction can be pre-qualified for purposes of the Act as well. With regard to the Authority's financial evaluation criteria, under N.J.A.C. § 19:31-3.4, the Authority performs what appears to be a fairly extensive credit check, similar to that which would be performed by any lending institution. The process indicated in the new regulations, in other words, is less about showing an inability to access capital and more about showing why the business should receive a loan. It's hard to assess, however, given the brevity of the description, whether this represents a real change, or rather a formalization. Either way, the risk remains that the program won't reach the disadvantaged small businesses it's ostensibly set up to help if the pre-qualification or financial evaluation procedures serve to screen them out.

### 6. Sanctions

The sanctions provisions are essentially the same. The new regulations eliminate the provision requiring that a retainage held by the Authority not be released until the Authority's Director provides notice as to whether the hiring provisions have been complied with, but this does appear, in slightly modified form, as the first required contract provision.

## **7. New Provision**

On a positive note, the new regulations add a section addressing subcontractor substitutions, which limits the ability of contractors to replace or terminate an MBE, WBE or SBE subcontractor. The contractor must make a request to substitute in writing and obtain written approval, and must try to find an MBE, WBE or SBE replacement.

The regulations specifically require that contractors and consultants comply with the law requiring prompt payment of subcontractors.

Finally, the new regulations require the Authority to use reported data to assess the overall status of the program, evaluate whether goals have been met, and assess the impact of the program. The description is very vague, providing no details as to how this will be done, when, and by whom.

## **8. Additional Changes Not Made**

The EDA has not included in its new regulations any district level planning and implementation process involving local stakeholders. There is thus still no place for local input, and no expressed intention to plan beyond a contract-by-contract basis. The minority and female hiring goals are set at the state level for each contract, and no goals are established by anyone for local hiring, aside from the promise, not included in these regulations, that bids will receive some unspecified amount of extra points if they come from Abbott district contractors. As noted above, the Authority has also rejected the idea of requiring bidders to submit Local Hiring and Contracting Plans.

No additional specifics have been provided regarding the performance evaluation criteria to be used in evaluating contractors and consultants. Nor do the regulations provide any clarification as to what constitutes non-compliance.

There is no provision for making any of the data on contractor performance and other issues relevant to the school districts and members of the public accessible to the public. Advocates had asked that this data be placed on the EDA's website. No such provision is included.

**EDA School Facilities Construction Affirmative Action Regulations  
Summary of Significant Changes from February, 2001 draft to  
June, 2001 Proposed Regulations**

<u>Provision</u>	<u>February 26<sup>th</sup> Draft</u>	<u>June 12<sup>th</sup> Draft</u>
Definitions	2.04: Included "Emerging Small Business," a race and gender neutral affirmative action beneficiary category.	<b>Deleted.</b> Only traditional affirmative action categories are used (MBE, WBE, and SBE).
Hiring Goals For Contractors	3.01: Contractor "shall insure" that it meets and that its subcontractors meet minority and female hiring goals set forth in the contract. No compliance measures are specified.  3.03: Performance evaluation will "reward those contractors that meet their hiring goals with work from Abbott districts." No contract provisions specified.	19-30-9.4: Contractor is in compliance if it has "made every effort to meet minority hiring goals and female hiring goals." Compliance requires process measures, not outcome measures.  <b>Deleted.</b> Section 19-30-9.6 requires that every contract must contain a provision that contractor "should endeavor to support the intent of the Authority to hire socially and economically disadvantaged workers living in Abbott districts."
Workforce Training	4.01: EDA "shall establish a training fund for pre-apprenticeship and apprenticeship training in trades and crafts" in which it will place up to 1/2 of 1% of money to be allocated to construction contracts for each year. Types of training not described.  4.03: Funds may also be used for outreach and recruitment, ancillary expenses of trainees and monitoring of participants and graduates.  4.07: Performance evaluation will reward contractor who meet hiring goals with pre-apprentice and apprentices trained in programs sponsored by EDA, its vendors, Treasury or Department of Labor.	19-30-9.8(a): EDA "may apply up to 1/2 of 1% of capital funds for approved school facilities projects to fund training for women and minority workers in life skills, pre-apprenticeship, and construction trades apprenticeship programs." Types of pre-apprenticeship training described.  19-30-9.8(g): Funds may be used for retention support services in addition to Outreach and recruitment, ancillary expenses and monitoring.  <b>Deleted.</b> Nothing comparable included.
Set-Asides	5.01: EDA may require contractor to make a good faith effort to subcontract up to 15% of contract value to ESBs. Contractors who expect to exceed goal will receive extra points in the evaluation process.  5.03: EDA can designate certain contracts as exclusively for ESBs.	19-30-9.9(a): EDA may require contractor to make good faith effort to subcontract up to 7% of contract value to MBEs, 3% to WBEs, 15% to SBEs.  19-30-9.9(b): EDA can designate certain contracts as exclusively for MBEs, WBEs or SBEs

ProvisionSet Asides,  
Cont'dFebruary 26<sup>th</sup> Draft

5.01(a)&(b): Contractors who can show that they will meet or exceed subcontracting goal with firms in A-900 districts will receive extra points in bid or proposal evaluation process.

5.02: "Good faith efforts" defined for contracting with ESB.

Contractor and  
Consultant Training

7.01: ED must implement and monitor a program to reward contractors who assist ESB firms to get experience necessary to compete for contracts, in either performance evaluation or bid proposal evaluations.

Subcontractor  
Substitutions

No provisions included.

June 12<sup>th</sup> Draft

**Deleted.** Nothing comparable included.

19.30-9.10: "Good faith efforts" defined.  
Reference to ESBs deleted.

**Deleted.** Section 19.30-9.14 provides that that contractors who graduate from training program will be eligible for additional support services, which may include a mentoring assistance program, but no incentive system for mentors included.

19.30-9-11: Contractor's ability to replace MBE, WBE or SBE subcontractors is limited, and request to do so must be made and approved in writing.

Neutral Developments

- EDA has entered into a Memorandum of Agreement providing that the state Department of Labor (DOL) will oversee the training and outreach programs to be funded under the "one half of one percent" provision. EDA has provided DOL with administrative funds for this program so that the overall amount of training and outreach funds will not be reduced.

New and Continuing Areas of Concern

- The new regulations eliminate incentives and preferences for contractors which hire or subcontract with Abbott residents or firms. The earlier rules provided that contractors who hired Abbott residents would receive additional points in the selection process and would be rewarded in their performance evaluations. EDA eliminated both of these provisions in the new regulations. EDA does state that it will provide such incentives in its as-of-yet unwritten "price and other factors" standard for evaluating bids. The prior specific incentive provisions are downgraded to a vaguely worded provision regarding EDA's intent to promote the hiring of Abbott residents.
- EDA fails to include a local or district level planning process to coordinate and maximize the hiring and contracting opportunities for local workers and firms.
- EDA has rejected the concept of requiring bidders to submit a local hiring and training plan. Advocates had suggested that this was important so that the EDA could select contractors based, in part, upon the appropriateness of such plans.
- EDA has limited the requirements associated with ensuring that contractors use apprentices on these projects, and failed to provide financial support for contractors who participate in pre-apprenticeship or construction careers programs.
- Measures of compliance are still vague. In addition, there are no provisions for public access to contractor performance or compliance data.

If you have any comments or questions, we may be contacted at 973-624-9400 or by email at [njisj.kz@verizon.net](mailto:njisj.kz@verizon.net) (for Ken) or [njisj.nf@verizon.net](mailto:njisj.nf@verizon.net) (for Nancy).

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